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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 1897

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Plaintiff,

vs.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the three-judge statutory court entered in this cause.

Opinion Below

A copy of the findings of fact, conclusions of law and final decree and judgment are attached hereto as Appendix A. These have not yet been reported. No opinion was rendered by the court.

Jurisdiction

This cause involves the judicial review of a decision and order of the Interstate Commerce Commission in which plaintiff seeks to have such an order set aside, annulled and its enforcement perpetually enjoined. The order was entered September 27, 1951, in a proceeding instituted by complaint of the City of Milwaukee against this plaintiff (referred to as "the North Western") and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (referred to as "the Milwaukee"). A copy of the order is attached hereto (Appendix B). It is based upon two published reports which appear at 279 I. C. C. 521 and 283 I. C. C. 311.

An appeal direct to the Supreme Court in such cases is authorized by Section 1253 of the Judicial Code (28 U. S. C. Sec. 1253; 62 Stat. 926). Such right of direct appeal was originally provided for in the Urgent Deficiencies Act of 1913 (38 Stat. 220) and was continued in effect by the Act of February 13, 1925 (43 Stat. 938).

The final decree and judgment of the three-judge statutory court was entered on July 16, 1952. A petition for appeal is presented to the district court herewith, towit, on August 27th, 1952. The time for taking this appeal, sixty days, is specified in Title 28, United States Code, Section 2101(b) (62 Stat. 961).

The following decisions, among many others, sustain the jurisdiction of the Supreme Court to review this case on direct appeal:

Interstate Commerce Commission v. *Hoboken Manufacturers R. Co.*, 320 U. S. 368, 370-1;

United States v. *Hancock Truck Lines*, 324 U. S. 774, 776-8;

United States v. *Idaho*, 298 U. S. 105, 109-110.

Statutes Involved

Paragraph (21) of Section 1 and paragraph (5) of Section 3 of the Interstate Commerce Act (Part I) are primarily involved since the Commission grounded its order thereon (49 U. S. C. Sec. 1(21), 41 Stat. 478; 49 U. S. C. Sec. 3(5); 41 Stat. 479). These were among the provisions enacted by Congress in its adoption of a new national transportation policy in Transportation Act, 1920. Section 3(4) therein has been renumbered to become 3(5) (54 Stat. 904).

Paragraphs (18), (19), (20) and (22) of Section 1 are also involved as they are parts of the 1920 regulatory scheme (49 U. S. C. Sec. 1(18)-1(22); 41 Stat. 477-8).

The Congressional declaration of "the national transportation policy," is also involved, inasmuch as this appeal presents questions as to the true meaning and intent of Congress as expressed in the foregoing statutes which "are to be administered and enforced with a view to carrying out the above declaration of policy" (49 U. S. C., preceding section 1; 54 Stat. 899) (Appendix C, hereto).

The Questions Presented Are Substantial

I. Questions Presented

A summary of the principal questions presented by this appeal and plaintiff's position respecting each, follows:

1. Whether the Interstate Commerce Commission has power under Section 1(21) of the Interstate Commerce Act to order the extension of the line of railroad of one carrier, the Milwaukee, for the sole purpose of reaching and directly serving a territory theretofore never reached or served by it, but for many years previously reached and served exclusively by a competing carrier, the North Western.

Section 1(21) provides, in pertinent part, that the Commission

> "may, after hearing, * * * require by order any carrier by railroad * * * to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, * * *"

and other findings specified in the section. It was held in *Interstate Commerce Commission* v. *Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14, 37, 40, that the Commission's authority under this section "is confined to extensions within the undertaking of the carrier to serve, and cannot be extended to embracing the building of what is essentially a new line to reach new territory." The court further pointed out that *future* public convenience and necessity cannot be considered under Section 1(21). In *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 277-9, the Supreme Court held that a railroad is prohibited from invading territory already served by a competing railroad unless a certificate be first obtained under Section 1(18) of the Act. No such certificate has been obtained or applied for in the instant case.

Plaintiff contends that the court erred in failing to find and hold that the Commission clearly exceeded its authority under Section 1(21).

2. Whether the Commission has authority under Section 3(5) of the Interstate Commerce Act to condemn and take from the North Western a strip of land 125 feet in length extending across the North Western's main line right of way for the sole purpose of providing a competing carrier,

the Milwaukee, with a right of way upon which to construct and operate the aforesaid extension of the Milwaukee's railroad for its own sole and exclusive use.

The pertinent part of Section 3(5) reads as follows:

> "If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, * * *"

This statute, which was enacted so that the Commission might have power to require the *joint use* of railroad terminal facilities, contains no grant of powers to the Commission to condemn a right of way of one railroad across the property of another railroad as a means of access to new territory, as was done in the Commission's order in the instant case. The Commission's assumption of power is without precedent.

Plaintiff contends the court erred in failing to find and hold that the Commission palpably misconstrued this section and exceeded its powers thereunder (1) by assuming power to condemn a strip of plaintiff's right of way, (2) by basing its order on the erroneous proposition that the strip of right of way in question is a "terminal facility" of the North Western, (3) by disregarding the fact that no joint use of terminal facilities of either railroad is proposed, (4) by employing Section 3(5) as a means to force construction and operation of a railroad extension into new territory, and (5) by imputing to this statute a grant of powers far

beyond any expressed therein or intended by Congress to be conveyed thereby.

Warm Springs Irr. Dist. v. *Pacific Live Stock Co.*, 270 F. 560;

Interstate Commerce Commission v. *U. S. Ex. Rel. Los Angeles*, 280 U. S. 52, 68-71;

Palmer v. *Massachusetts*, 308 U. S. 79.

3. Whether the order of the Commission, which, as shown by the undisputed evidence before it, would compel a wasteful and entirely unnecessary duplication of railroad switching operations and services and would create an additional and completely unnecessary operating hazard, can properly be upheld in view of the Congressional mandate expressed in the National Transportation Policy (54 Stat. 899; Title 49 U.S.C., note preceding Section 1) and the Interstate Commerce Act, particularly paragraphs (18) to (22) of Section 1. These statutes are set forth in Appendix C, hereto.

The Supreme Court has said that Congress sought by these sections to provide for conservation of the financial resources of individual carriers by avoiding the waste involved in building unnecessary lines into territory already served by another carrier and the injury which one railroad inflicts upon its rival thereby. *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 277. This general purpose is stated in numerous other Supreme Court decisions and is confirmed by the declaration of the National Transportation Policy "to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation." Avoidance of "unfair or destructive competitive practices" is also one of the important stated objectives. Congress further admonished that "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Plaintiff contends that the court erred in failing to find and hold the Commission's order should be set aside because the Commission clearly disregarded and failed to follow the Congressional intent and admonition.

New York Central Securities Co. v. *U. S.*, 287 U. S. 12, 24-5;
New England Divisions Case, 261 U. S. 184, 189;
Davis v. *Farmers Coop. Equity Co.*, 262 U. S. 312, 317;
Interstate Commerce Comm. v. *Railway Labor Ex. Ass'n.*, 315 U. S. 373, 376-7.

4. Whether the Commission's order may properly be upheld when it appears on the face of the order and accompanying reports that the Commission's findings are limited to ultimate conclusions without essential basic factual findings to support them.

On the issue of public convenience and necessity no facts were found or stated in the report to support the ultimate conclusion that direct access of the Milwaukee to the Harbor Terminal "is necessary in the development of the harbor area." (279 I.C.C. at p. 531.) The preceding factual finding negatived the general conclusion: it showed a five-fold increase in the Harbor Terminal traffic in the preceding 20 years. (279 I.C.C. p. 530.) The Commission virtually conceded the correctness of the North Western's contention that the *present* volume of traffic does not justify duplicate service by another railroad. (279 I.C.C. at p. 529.) It specifically found there would be an immediate decrease of 1592 cars of coal per year, that being 27% of the total annual traffic to and from the Harbor Terminal area. The general conclusion as to serious delays which would be avoided by direct service of the Milwaukee is entirely unsupported by any finding of facts as to what these delays were, their importance or effect, or as to other available means of avoiding them.

With respect to Section 3(5) there were no findings or conclusions, either general or specific, to the point that the North Western was not "providing reasonable, proper, and adequate facilities for the interchange of traffic with the Milwaukee Road," as alleged in the City's complaint; nor were there any findings of basic facts essential to show that it would be in the public interest for the Milwaukee to use any terminal facilities of the North Western; or that such use would be practicable without impairing the North Western's ability to handle its own business. The facts stated in the Commission's reports and the terms of its order show clearly that no use of terminal facilities of the North Western is proposed by the City or covered by the order. (283 I.C.C. 314-5; Appendix B, hereto, paragraphs 3, 5 and 6.) Reference to the extension of the Milwaukee's line across the North Western's main line tracks and right of way as a use of "terminal facilities" emphasizes the deficiency of essential basic findings.

Plaintiff contends that the Commission's order is void on its face because of this obvious lack of basic and essential factual findings and the court erred in failing to so find and hold.

Florida v. *United States*, 282 U. S. 194, 214-5;
United States v. *Baltimore & O. R. Co.*, 293 U. S. 454, 464-5;
United States v. *C. M. St. P. & P. R. Co.*, 294 U.S. 499, 510-11;
City of Yonkers v. *United States*, 320 U. S. 685, 687-8, 690-1;
North Carolina v. *United States*, 325 U. S. 507, 519-21;
United States v. *Champlin Refining Co.*, 341 U. S. 290, 300-1.

5. Questions whether, without regard for questions of jurisdiction and requisite factual findings, the Commission's

order should be set aside because it lacks the support of substantial evidence and is contrary to and in disregard of undisputed evidence of an important and controlling character.

Evidence mentioned in the Commission's report perhaps relied upon by the Commission to support its ultimate findings on the issues of public convenience and necessity and the public interest may be briefly summarized as follows:

(a) A tentative plan of the City of Milwaukee's Harbor Commission, described as a "long-range comprehensive program for the construction of extensive additional facilities and installations in the harbor area * * * in the expectation that there will be a continuous growth of traffic requiring use of these facilities and installations" (279 I.C.C. 529). The Municipal Port Director related this to the "possibility of future ocean traffic." The "program" was only a plan for possible future development and not dependent upon extension of direct service of the Milwaukee to the City's Harbor Terminal.

(b) Testimony by a very few shippers as to occasional experiences of serious delay on rail shipments to the Harbor Terminal which caused a number of them to use the available trucking service instead; also, some general testimony indicating that the present two-line interchange service involves a 24-hour delay which would be obviated by the proposed direct service of the Milwaukee to the Harbor Terminal. There was no evidence and no claim that these delays could not be eliminated by other means shown to be readily available by changing the point of interchange to Washington Street.

Plaintiff urged the court to find that this fell far short of being substantial proof to support the Commission's ultimate findings on these issues. Plaintiff likewise showed a lack of evidence to support the Commission's further ulti-

mate findings under Section 3(5) that the proposed construction and operation of the Milwaukee's line extension across the North Western's main line tracks and right of way would be safe and practical and would not substantially impair North Western's ability to handle its own business.

Further, the plaintiff showed to the court that the Commission acted arbitrarily in disregarding and failing to give any legal effect whatever to the following facts established by the undisputed evidence before it:

(a) Very rapid expansion and development of the Jones Island Harbor Terminal and traffic have taken place during the past 20 years under direct service by the North Western, only. Prospects for future increase in traffic through Jones Island Terminal were entirely conjectural in nature, no specific prospective increase being shown. A definite immediate decrease of 1592 carloads of coal annually was shown due to conversion from coal to gas for fuel.

(b) North Western's existing facilities and 24-hour service to the Jones Island Harbor Terminal are adequate to handle twice the present volume of traffic. No claims of inadequacy or inequality of the existing interchange service or facilities were made. Such occasional delays as were referred to by a very few shippers were not shown to have caused any hardship, loss or serious inconvenience. A large number of trucking companies are authorized to render highway trucking transportation service to and from the Harbor Terminal and such service is being used by those shippers who find it suits their needs better than the rail service.

(c) 751 industrial concerns in the Milwaukee Switching District have direct rail service. 464 are served by the Milwaukee and 287 are served by the North Western. Among these are only 52 directly served by both railroads.

Of all these shippers, only 11 exhibited any interest in the proposed extension of the Milwaukee's railroad to reach the Harbor Terminal. These few shippers failed to show or claim any necessity for direct service by the Milwaukee.

(d) The interchange facilities and arrangements furnished by the North Western for traffic to and from the Harbor Terminal were shown to be ample, appropriate and of the same character as those in effect elsewhere. No necessity to supplement North Western's facilities or service was shown.

(e) The existing facilities of the two railroads at Washington Street are available for the interchange of freight moving to and from Jones Island Harbor Terminal, which is largely dead freight. Live stock and perishable freight are now interchanged at this point. If dead freight were included this would shorten the time required to complete the interchange by six hours and the switching distance by five miles. It would provide a more expeditious route, with less switching for the Milwaukee, than the proposed direct service. Such interchange would avoid the wasteful and unnecessary duplication and maintenance of facilities and service required by the Commission's order. It would also avoid the extraordinary and unnecessary hazard resulting from the Milwaukee's proposed slow-speed switching movements across the North Western's high-speed main line passenger tracks.

(f) The carrying out of the Commission's order would impose a serious and substantial, irreparable loss upon plaintiff.

Plaintiff contends that the court should have set aside the Commission's order because of its arbitrary action based upon ultimate findings without substantial supporting evidence and contrary to the evidence; and because of the Commission's flagrant failure to consider or give any

legal effect whatever to the foregoing and other elements of undisputed testimony of an important and, in many instances, a controlling bearing upon the issues. This action on the Commission's part constituted a denial of due process of law. *Interstate Commerce Commission* v. *Louisville and Nashville R. R. Co.*, 227 U. S. 88, 91, 92; *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U. S. 541, 543, 547. Plaintiff had the right to be heard "before a tribunal bound not only to listen but to give legal effect to what has been established." *Oregon R. R. & N. Co.* v. *Fairchild, et al.*, 224 U. S. 510, 525. "To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action." *The Chicago Junction case*, 264 U. S. 258, 265. See also, *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 431. By these decisions and many others it has long been recognized that questions like those here raised are mixed questions of law and fact for the independent review and judgment of the court, since deprivation of plaintiff's constitutional rights is involved. *United States* v. *Idaho*, 298 U. S. 105, 109; *United States* v. *Felin & Co.*, 334 U. S. 624, 639-40.

6. Related questions and points are reserved for discussion on brief.

II. These Questions Are Substantial

The very character of the questions which lie at the threshold of this case, we submit, proves their substantiality. On the issue as to the Commission's power under Section 1(21), here is a Commission decision which is in direct conflict with *Interstate Commerce Commission* v. *Oregon-Wash. R. & Nav. Co.*, 288 U. S. 14, 37, 40, in that (1) it would extend the Milwaukee into new territory and (2) would do so upon a theory of *future* not *present* public convenience and necessity.

Again on the issue of power under Section 3(5), it is apparent that the Commission has undertaken to extend its authority far beyond anything expressed in the statute and beyond anything the Commission heretofore has attempted or assumed it had the right to do. If this section is in this instance to be used to condemn a part of one railroad's right of way and thus to extend the line of one railroad across the main line of a rival in order to invade the latter's territory, an entirely new precedent as to the Commission's power will have been created and a new concept of competitive practices permissible in the public interest will have been established. This is a case of first impression in so far as Section 3(5) is concerned. It is of the utmost importance to all carriers, shippers and the public that the extent of the Commission's authority be well marked and understood.

The extensive nationwide importance of this issue is well exemplified by the evidence in this case showing that the two carriers here involved have competitive situations with interchange arrangements similar to that in Milwaukee at no less than 35 different cities in the State of Wisconsin, alone, with like close competition between them in five other states. In Milwaukee the territories served are so divided that the Milwaukee already serves exclusively nearly twice as many industrial concerns as the North Western. Large sections in Milwaukee are adequately served by one or the other of these companies, by means of tracks and facilities which they have built, maintained and improved throughout the years.

The Jones Island Harbor Terminal area is one of those served exclusively by the North Western. It is not presently accessible to the Milwaukee since it lies east of the North Western's main line and the Milwaukee's railroad and exclusively served territory lie to the west, well back from the lake shore. In a similar factual situation, on

a proceeding under Section 1(18) the Commission recognized that the carrier whose territory was sought to be invaded "has undoubted rights by virtue of its relatively favorable location." *Missouri Pac. R. Co. Extension*, 187 I. C. C. 77, 87.

If Section 3(5), or a combination of that section and Section 1(21), can be used to support an invasion by the Milwaukee of the North Western's lake front territory and provide the land upon which the invading track will be constructed, then, conversely, authority will exist for a like invasion of the Milwaukee's territory west of its main line by the North Western with the necessary right of way across the Milwaukee's main line. The potentialities for competitive and retaliatory "invasions" are numerous in this one city alone. With every city of much consequence in the entire country served by two or more competing carriers involved in similar competitive situations, the magnitude of the problem posed by upholding this particular Commission order is at once apparent.

In a similar instance, where an attempt was made to extend the power of the Commission under Section 3(5) and related sections to the subject of joint passenger stations, the Supreme Court concluded it could not so hold "without more specific and express power than is found in the act." The far-reaching nation-wide importance of the matter was stressed in the court's opinion. *Interstate Commerce Commission* v. *U. S. Ex. Rel. Los Angeles*, 280 U. S. 52, 68-69. The instant case would equally appear to be deserving of attention by the highest judicial authority of the nation. Plaintiff believes the same conclusion must here be reached.

The remaining questions are likewise substantial, involving as they do action by the Commission with obvious disregard for requirements so often laid down in the decisions of the Supreme Court that a statement of ultimate con-

clusions cannot support an order unless basic facts are also found and stated by the Commission so as to furnish a logical underlying and supporting structure. The paucity of such findings is apparent upon reading the Commission's two rather lengthy reports (279 I. C. C. 521-31 and 283 I. C. C. 311-317). These reports consist very largely of statements of historical facts—so-called background evidence—and references to the respective contentions of the parties, but without specific findings of fact by the Commission with respect thereto. Three pages of the first report (525-528) and two pages of the second (313-4) are largely taken up with discussion incident to the Commission's decision first that it did have and later that it did not have authority to order the proposed trackage extension of the Milwaukee under Section 1(9) of the Interstate Commerce Act (49 U. S. C. Sec. 1(9); 36 Stat. 547; 41 Stat. 475). Findings *per se* are limited to the last two paragraphs of each of the Commission's reports. A combing of the preceding pages for such factual statements as may appear to have been made by the Commission on its own account produces an altogether insufficient support for the compulsory action ordered by the Commission, as we have indicated above and as we specifically pointed out to the District Court on oral argument, in brief and in requested findings of fact and conclusions of law.

No less substantial are the questions above noted wherein plaintiff has sought relief from the Commission's order because of the lack of supporting evidence in the record and because of the Commission's ultimate conclusions being in conflict with the undisputed evidence and in flagrant disregard of such undisputed evidence in some most important and controlling aspects.

In this jurisdictional statement we refrain from going into more detail than has been stated above with respect

to these questions. It is axiomatic that Commission action directly contrary to the undisputed evidence and action indicating that the Commission failed to give any consideration, weight or legal effect whatever to undisputed relevant facts before it are equally violative of those rights which have been guaranteed to all citizens by the Fifth Amendment of the Constitution. These points, we believe, need no more development here than the brief citations of authoritative decisions set forth above in our statement of "Questions Presented."

The nationwide interest in the basis for compulsory Commission action, under the sections of the Interstate Commerce Act here involved, naturally follows very closely the national concern as to the limits of the Commission's power under those sections. The rights and obligations of carriers, shippers and other owners of terminal facilities will be affected in many important respects by the final outcome of this case and, as previously pointed out, being one of first impression, as regards Section 3(5), and involving as it does a conflict with the Supreme Court's previous ruling on the Commission's authority under Section 1(21), need for an authoritative ruling by the court of last resort is urgent.

That the proposed invasion of plaintiff's territory would impose a serious and substantial immediate loss of revenue upon the plaintiff was proven without dispute. It also appears without dispute that the invader has a larger and more extensive railroad system than the rival upon whom it would inflict injury in this instance. As Mr. Justice Brandeis well pointed out, actions of this character have become recognized "matter(s) of national concern," even where permissive action alone is under consideration. *Texas & P. R. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 277. When, as here, we have a case of compulsory action which involves also serious questions regarding violation

of plaintiff's constitutional rights, the need for the most careful scrutiny and consideration seems the more imperative.

For the reasons stated above, it is respectfully submitted that the questions presented are substantial.

NYE F. MOREHOUSE,
P. F. GAULT,
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Attorneys for Plaintiff-Appellant.

August 27th, 1952.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 1897

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation, *Plaintiff*,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Defendants*

Findings of Fact and Conclusions of Law

The above-entitled action having come on for final hearing on May 9, 1952 before the duly constituted district court of three judges established pursuant to sections 2284 and 2321-2325, Title 28 of the United States Code, and the court having considered the pleadings and evidence contained in the record made before the Interstate Commerce Commission and heard arguments of counsel and taken the cause under advisement, now makes the following findings of fact and conclusions of law.

Findings of Fact

1. The main line of Chicago and North Western Railway Company, hereinafter called the North Western, enters the city of Milwaukee from the south and parallels the shore of Lake Michigan for a considerable distance. The main line of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter called the Milwaukee, also enters the city from the south and is some distance west of the main line of the North Western, so that the right-of-way of the latter railroad lies between the right-of-way of the Milwaukee and the shores of the lake.

2. In the 1920's, the city set out on a long-range plan of developing a municipal harbor facility on a tract of land on the shore of Lake Michigan, known as Jones Island, and

in that connection has constructed warehouses, docking facilities, switching tracks and other installations necessary to carry on a harbor operation. In 1928, the city entered into an agreement with the North Western whereby the city agreed to allow the North Western to connect with its trackage in the harbor facilities and to carry on the operation of rendering railroad service to that facility. In this contract, it was expressly provided that the city reserved the right to give equal rights to any other railroad. Under the agreement of 1928, the North Western has been the sole common carrier having physical connections with the trackage of the city on Jones Island and up to the present time, all overland railroad traffic originated at the harbor or destined for the harbor is handled by the North Western in the terminal operation in the city.

3. When the harbor facility was first being developed, the city did not own all of Jones Island. One hundred thirty-two acres of land on the south side of the island was owned by the Illinois Steel Company. This company was served by the Milwaukee by a track known as the Bay View spur which crossed the main line of the North Western and connected with certain trackage owned by the steel company. The right of the Milwaukee to cross the tracks of the North Western to serve the steel company was based on a series of agreements and arrangements dating back to 1872. In 1938 the city bought the land owned by the steel company and the steel mill was dismantled and thereafter the whole island was consolidated for the purpose of developing the harbor facilities. After the steel mill was dismantled, the Bay View spur of the Milwaukee, which formerly served it as stated above, was left intact and has been maintained in a condition fit for use up to the present time, although as a matter of fact, that portion of this track which crosses over the lines and right-of-way of the North Western has not been used. This track does not extend all the way across the right-of-way of the North Western and, therefore, does not physically connect with the property owned by the city on Jones Island.

4. In 1926, the Board of Harbor Commissioners and the Common Council of the City of Milwaukee declared as a matter of public policy that the Milwaukee public port

facilities should be open to all shippers and carriers on equal terms. Thereafter, the Milwaukee port authority endeavored to have the Bay View crossing extended 125 feet more or less, so that it would connect with a proposed track to be built by the harbor authority and, therefore, give the Milwaukee a direct connection with the trackage in the harbor facility. It is undisputed that officials of the city held frequent conferences with the officials of the two railroads and tried to work out some arrangement whereby such an extension could be made and a direct service of the Milwaukee consummated by agreement. It appears that these conferences were unsuccessful.

5. Upon the failure of the conferences, the city brought a proceeding before the Public Service Commission of Wisconsin, asking that that Commission direct the construction of the extension and the use thereof. After extensive hearings, the Wisconsin Commission held that it did not have jurisdiction because of the interstate commerce involved. Thereupon, on July 1, 1949, the city filed a complaint with the Interstate Commerce Commission, alleging that it was entitled to relief under the provisions of section 1, paragraphs 18 to 22, of the Interstate Commerce Act. The complaint was subsequently amended in December 1949 so that it embraced section 3, paragraph 5, of the Interstate Commerce Act, among other sections, as alleged basis for relief.

6. Hearings were held before an examiner of the Commission at Milwaukee and Washington. Considerable evidence was introduced by all parties concerned. The North Western throughout opposed any order of the Commission directing the extension requested and its use. The examiner submitted a proposed report recommending the extension and the other relief prayed. The North Western filed exceptions to the report and the matter was orally argued before Division 3 of the Commission in November 1950. On November 15, 1950, Division 3 filed its report. In its report, Division 3, after extensive subordinate findings, concluded that the Commission had authority to order the extension in question under section 1, paragraph 9, of the Interstate Commerce Act and section 1, paragraph 21, and directed that an order be entered directing the parties

to go forward with the construction under certain conditions. In January 1951 the North Western filed a petition for reconsideration by the entire Commission and on September 27, 1951 the Commission entered an order reopening the proceedings and on the same date issued its report on reconsideration with the accompanying order based thereon.

7. In its report the full Commission held that it had authority to order the extension under section 1, paragraph 21, and section 3, paragraph 5 of the act. After reviewing the evidence and incorporating by reference certain of the findings made in the report filed by Division 3, the full Commission found that the extension of the line of the Milwaukee was reasonable, required in the interest of public convenience and necessity, and that the expense involved therein would not impair the ability of the road to perform its duties to the public. It further found that the use by the Milwaukee of the facilities of the North Western was in the public interest and that the operation over the cross-over track was practicable and could be carried on without either occasioning an unsafe condition or substantially impairing the ability of the North Western to handle its own business. In its report the Commission stated that under section 3, paragraph 5 of the act the Milwaukee road was required to pay reasonable compensation to the North Western for the use of its right-of-way. The order of the Commission entered pursuant to the report directed that the Milwaukee road go forward with the construction of the extension upon proof that the city had constructed a siding with which the extension would connect. The trackage so ordered by the Commission has been installed by the City at substantial cost, and is ready for use as soon as said cross-over is extended to meet the new city track. It was ordered that the two railroads hold conferences to the end that an agreement might be reached between them with respect to the payment of compensation to the North Western road for the use of its right-of-way. In this connection it was provided in the order that if an agreement could not be reached with respect to compensation, the Commission would hold further proceedings and fix just and reasonable compensation.

Conclusions of Law

1. The court has jurisdiction over the cause and the parties thereto.

2. The Commission has jurisdiction over the proceedings wherein the said report and order filed on September 27, 1951 were made and had jurisdiction to make said order and report.

3. The Commission had authority to enter its order of September 27, 1951 directing the Milwaukee to extend its line under Section 1, Paragraph 21 of the Interstate Commerce Act.

4. The Commission had the authority to enter its order directing the North Western to permit the construction of the extension under Section 3, paragraph 5, of the Interstate Commerce Act.

5. There was substantial evidence to support the Commission's finding that the extension ordered was reasonably required in the interest of public convenience and necessity, and that the expense involved therein would not impair the ability of the Milwaukee road to perform its duties to the public.

6. There was substantial evidence in the record to support the Commission's finding that the use by the Milwaukee of the right-of-way of the North Western railroad was in the public interest.

7. There was substantial evidence in the record as a whole to support the Commission's finding that the construction of the extension across the right-of-way of the North Western was practicable, and that the operation over a cross-over track could be carried on without either occasioning an unsafe condition or substantially impairing the ability of the North Western road to handle its own business.

8. The report of the Commission is adequate.

9. The order of the Commission directing the construction of the extension and directing North Western to permit the construction across its right-of-way and the contemplated operation over the resulting cross-over track is a legal and valid one.

10. The injunction should be denied and the suit should be dismissed.

July 16, 1952.

J. Earl Major,
United States Court of Appeals Judge;
J. Sam Perry,
United States District Judge;
Walter J. LaBuy,
United States District Judge.

Dated July 16, 1952.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 51 C 1897

Chicago and North Western Railway Company, a Corporation, *Plaintiff,*

v.

United States of America and the Interstate Commerce Commission, *Defendants*

Decree

The above action came on for hearing before the duly constituted three judge statutory court, sitting in the United States Court, at Chicago, on May 9, 1952, and the court having considered the pleadings and evidence contained in the record made before the Interstate Commerce Commission and heard the arguments of counsel and taken the cause under advisement, and the court having duly considered the issues so presented and the law and facts relating thereto and being fully advised in the premises and having entered its Findings of Fact and Conclusions of Law, to the effect that the complaint herein should be dismissed,

It is ordered, adjudged and decreed that the injunction

prayed for herein be denied and the complaint be, and the same is hereby dismissed at the cost of plaintiffs.

J. Earl Major,
United States Court of Appeals Judge;
J. Sam Perry,
United States District Judge;
Walter J. LaBuy,
United States District Judge.

Dated July 16, 1952.

APPENDIX B

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of September, A. D. 1951.

No. 30288

City of Milwaukee

v.

Chicago and North Western Railway Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company

It appearing, That Division 3, on November 15, 1950, made and filed its report in the above-entitled proceeding; and that upon petition of the defendant Chicago and North Western Railway Company, the proceeding was reopened for reconsideration;

It further appearing, That the Commission has, on the date hereof, made and filed a report on reconsideration containing its findings of fact and conclusions thereon, which said report and the aforesaid report of Division 3 are hereby referred to and made a part hereof:

It is ordered, That defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company be, and it is hereby, noti-

fied and required to extend its line of railroad, known as the Bay View spur, now terminating at a point south of East Bay Street in Milwaukee, Wis., across the main line tracks and right-of-way of defendant Chicago and North Western Railway Company to a connection with the municipal harbor terminal of complainant City of Milwaukee east of and adjacent to said right-of-way.

It is further ordered, That the extension hereby required to be constructed shall be commenced on or before December 10, 1951, and shall be completed and in operation before February 11, 1952.

It is further ordered, That the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company be, and it is hereby, notified, and required on or before February 11, 1952, to use the terminal facilities of the said Chicago and North Western Railway Company at Milwaukee, Wis., involved in extending its line, as described in the second preceding paragraph hereof, across the main line tracks and right-of-way of the said Chicago and North Western Railway Company.

It is further ordered, That the said Chicago and North Western Railway Company be, and it is hereby, notified and required on and after February 11, 1952, to permit the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company to use its terminal facilities at Milwaukee, Wis., as described in the next preceding paragraph hereof.

It is further ordered, That the aforesaid use of the said terminal facilities shall be upon such terms and for such compensation as the said carriers may agree upon, or, if they shall be unable so to agree, then upon such terms and for such compensation as the Commission shall pursuant to a further hearing upon request, hereafter fix as just and reasonable, as ascertained in accordance with the provisions of section 3(5) of the Interstate Commerce Act.

It is further ordered, That the enjoyment of the use of said terminal facilities hereinabove described shall be subject to the right of the said Chicago and North Western Railway Company to require that the compensation for the said use shall be paid or shall be adequately secured to it before the said use shall be commenced.

And it is further ordered, That this order shall continue in force and effect until the further order of the Commission.

By the Commission

W. P. BARTEL,
Secretary.

(SEAL.)

APPENDIX C

Title 49, U. S. Code, Section 1(18):

> No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Title 49, U. S. Code, Section 1(19):

> The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this chapter shall apply to all such proceedings. Upon

receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

Title 49, U. S. Code, Section 1(20):

The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this

section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Title 49, U. S. Code, Section 1(21):

The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and to extend its line or lines: *Provided*, that no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this chapter which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Title 49, U. S. Code, Section 1(22):

The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Title 49, U. S. Code, Section 3(5):

If the Commission finds it to be in the public interest and to be practicable, without substantially impair-

ing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use or both, as the case may be.

National Transportation Policy, 54 Stat. 899; Title 49 U. S. Code, note preceding Section 1:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; *to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of reasonable charges for transportation services, *without*

unjust discriminations, *undue preferences or advantages, or unfair or destructive competitive practices;* to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—*all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.* (Emphasis supplied.)

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

No. 51 C 1897

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Appellant*

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, *Appellees*

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, appellees United States of America and the Interstate Commerce Commission move that the decree of the district court be affirmed. This is a direct appeal from a final decree entered July 16, 1952 by a specially constituted district court of three judges convened pursuant to 28 U.S.C. 2284 and 2325. The decree dismissed appellant's petition to set aside an order of the Interstate Commerce

Commission.[1] Appeal was allowed on August 27, 1952 and appeal papers were served on the same date.

The pertinent order of the Interstate Commerce Commission (see Statement as to Jurisdiction, App. B) was entered on September 27, 1951 in a proceeding instituted by complaint of the City of Milwaukee against the Chicago & North Western Railroad Company (hereinafter called "North Western") and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company (hereinafter called "Milwaukee"). This order, based on two reports by the Commission (279 I.C.C. 521 and 283 I.C.C. 311), directed the Milwaukee to construct a short extension of one of its tracks in the terminal area of the City of Milwaukee in order to make direct connection with trackage in a municipal harbor facility of the City, known as Jones Island. The extension which the Milwaukee is directed to construct involves a crossing of the main tracks and right-of-way of the North Western. The Commission relied upon Section 1 (21) of the Interstate Commerce Act as conferring authority to direct the extension, and upon Section 3 (5) as authorizing a direction to the North Western that it permit the construction across its right-of-way.

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[1] The court, consisting of Circuit Judge J. Earl Major, and District Judges J. Sam Perry and Walter J. LaBuy, filed findings of fact and conclusions of law on July 16, 1952. The court did not file an opinion.

The order further provides that the Milwaukee shall compensate the North Western for the use of its facilities upon such terms as the carriers may agree, or, failing agreement, "upon such terms and compensation as the Commission shall pursuant to a further hearing upon request, hereafter fix as just and reasonable * * * " In its petition to set aside the order, the North Western has challenged the Commission's statutory authority, the findings upon which its order rests, and the sufficiency of the evidence. The Milwaukee railroad, the City of Milwaukee and the Wisconsin Public Service Commission have intervened in support of the order.

The background facts and history of the proceeding are fully set forth in the Commission's reports[2] and in the findings and conclusions of the district court (see Statement as to Jurisdiction, App. A). For present purposes, the facts may be briefly summarized as follows:

The main lines of the Milwaukee and the North Western enter the City of Milwaukee from the south and run parallel to each other and to the shore of Lake Michigan. The North Western's line lies between the Milwaukee line and the lake front. In the 1920's, the City initiated a long-

[2] The report of the entire Commission on reconsideration (283 I.C.C. 311) and the previous report by Division 3 (279 I.C.C. 521) are complementary, the later report incorporating by reference many of the findings contained in the earlier report; accordingly, they must be read together.

range plan for developing a municipal harbor facility on a tract of lake-front land known as Jones Island. It has since constructed extensive installations there—docking facilities, warehouses, switching tracks, and the like. In 1928, the City agreed to allow the North Western to connect its tracks to the harbor facility in order to render railroad service. The contract expressly reserved to the City the right to make similar arrangements with other railroads. Down to the present time, however, the North Western has been the sole carrier physically connecting with Jones Island. Accordingly, "all overland railroad traffic originated at the harbor or destined for the harbor is handled by the North Western in the terminal operation in the city" (D. Ct. Fdg. No. 2).

In 1926, the city authorities of Milwaukee decided that, as a matter of public policy, the public port at Jones Island should be opened to all shippers and carriers on equal terms. Pursuant to this decision, municipal officials proposed that the Milwaukee extend certain trackage which it owned so as to connect up with the harbor tracks. The necessary extension would have been extremely short (as is the extension presently ordered by the Commission) but conferences looking to an agreement whereby the Milwaukee might cross the North Western's line were unproductive. Thereafter, the City instituted proceedings before

the Public Service Commission of Wisconsin asking that it direct construction of the extension. After lengthy hearings, that body concluded that it lacked jurisdiction because of the interstate commerce that was involved. Thereupon, in 1949, the City brought the present proceeding before the Interstate Commerce Commission.

At hearings held in Milwaukee and Washington, D. C. before an examiner, considerable evidence was introduced relative to the need and the practicality of the proposed extension. The Commission received evidence showing that there has been a steady increase in traffic volume at the harbor since 1929, and that frequent delays occur as a result of the one-carrier system of operation. It also received evidence relating to plans of the city authorities to develop the harbor further and to promote additional traffic. Some of these plans are presently being effectuated (279 I.C.C. at 529-530). The Commission found (Id., p. 531):

> The present joint-line switching service from and to industries on the line of the Milwaukee to and from the harbor terminal involves serious delays which would be avoided if the proposed extension and switching connection were made. Direct access to the harbor tracks by the Milwaukee as well as by the North Western is necessary in the development of the harbor area.

It also found that the necessary extension would only be 238 feet in length and the estimated cost of the job approximately $3700. (*Id.*, p. 525).

The Commission also had before it considerable expert testimony relating to the technical operation involved in the construction and use of a cross-over track. It took particular cognizance of the evidence concerning various safety devices which would be employed. Analyzing these factors, the Commission concluded (283 I.C.C. at 315):

> We are of the opinion that the record amply supports a conclusion that the use by the Milwaukee of the terminal facilities of the North Western involved in operating the cross-over across the tracks and right-of-way of the North Western to and from point of connection with the sidetrack of the harbor terminal would neither be unsafe nor substantially impair the ability of the North Western to handle its own business, and that such use would be in the public interest.

The Commission also made the ultimate finding (279 I.C.C. at 531):

> * * * that the desired extension of the line of the Milwaukee is reasonably required in the interest of public convenience and necessity, and that the expense involved therein will not impair its ability to perform its duty

to the public. We further find that the desired switch connection between the extension of the Milwaukee and the municipal harbor tracks at Milwaukee is reasonably practicable, can be put in with safety, and that sufficient business will be furnished to justify its construction and maintenance, and that it should be constructed and maintained by the Milwaukee.

1. Section 1 (21) expressly authorizes the Commission to order a carrier to extend its lines, upon a finding that the extension is in the interest of the public convenience and necessity and that the expense involved will not impair the carrier's ability to serve the public. The Commission, as already observed, has made those findings here.

Appellant seeks comfort from the decision in *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U.S. 14, which disapproved a Commission order directing the Oregon-Washington line to construct 214 miles of new track in order to serve a sparsely populated section of Oregon. Pointing out that the company had not held itself out to serve the area in question, the Court held (p. 40) that the Commission's authority to order extensions "is confined to extensions within the undertaking of the carrier to serve, and cannot be extended to embrace the building of what is essentially a new line to reach new territory". The case is obviously not in point

here. Milwaukee is one of the primary centers which the Milwaukee line serves. The railroad has been serving the City for years. It would be palpably absurd to suggest that a 238 foot extension enabling it to serve the harbor facility built by the City will constitute "what is essentially a new line to reach new territory".[3]

The Court also stated in the *Oregon-Washington* case (288 U.S. at 37) that the public convenience to which Section 1 (21) refers is a presently existing public need.[4] Appellant argues from this that the Commission erred in hearing testimony concerning the developmental program in the harbor area. We submit that this evidence was properly received in view of the fact that it appeared that the program was under way and that some of the new construction of installations was actually in progress. In any event, the Commission found, upon the basis of substantial evidence, that delays already occur by virtue of the present system of operations and that an addi-

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[3] It may also be noted that in the *Oregon-Washington* case it was the railroad directed to effect the extension which was objecting that it had not undertaken to serve the territory in question and could not constitutionally be compelled to do so. The Milwaukee, in the instant case, has no objection whatever to extending its line. Quite the contrary. Accordingly, even if the extension in question reached to an area beyond the undertaking of the Milwaukee—plainly, it does not—the North Western would have no standing to object that the new construction imposes an unwarranted burden.

[4] Unlike Section 1 (18), Section 1 (21) does not refer to "present or future public convenience and necessity."

tional railroad connection to the harbor is presently in the public interest.

Appellant's reliance upon *Texas & Pacific R. Co.* v. *Gulf, Colorado & Santa Fe R. Co.*, 270 U.S. 266, is also misplaced. In that case, the Gulf built an extension without obtaining Commission authorization, contending that the new track was but an industrial spur and that, under Section 1 (22), no authorization for that type of construction was required. The Court found that the new construction was not a spur but an extension of the Gulf's line and that it could not be built without a finding by the Commission that the public convenience and necessity required it. In the instant case, the Commission has found that public convenience and necessity do require the construction and it has specifically directed that it take place.

2. The Commission's authority to direct the North Western to permit the construction of the extension across its right-of-way is found in Section 3(5), which provides in pertinent part:

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities,

> including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. * * *

The Commission found that the use which it directed the North Western to permit is in the public interest, that it is practicable, and that it will not substantially impair the ability of the North Western to handle its own business. North Western contends that the use of a right-of-way is not, properly speaking, use of a terminal facility. But it can scarcely be disputed that the operation involved—providing railroad service to the harbor—is a terminal operation. Indeed, the proposed extension will take place in the very center of the maze of switching operations which make up the terminal of the City of Milwaukee. The Commission stated (283 I.C.C. at 315):

> Such portion of the right-of-way of the North Western is a terminal facility, both in the sense that it lies within the corporate and

> switching limits of Milwaukee and in the sense that it is in part used for switch and spur tracks in serving industries and piers in the harbor terminal. * * *

This determination was peculiarly within the expert competence of the administrative agency.

We would point additionally to the broad purpose which motivated the adoption of Section 3 (5). Prior to the passage of the Transportation Act of 1920, the Interstate Commerce Act provided that no common carrier was required to give the use of its tracks or terminal facilities to a competing carrier.[5] The 1920 Act completely reversed this policy and conferred direct and explicit power to require the use by one carrier of the full terminal facilities of another carrier. This Court has stated that "It is obvious * * * that Congress intended to place under the superintending and fostering direction of the Interstate Commerce Commission all increased facilities in the matter of distribution of cars and equipment and in joint terminals, in the exchange of interstate traffic and passengers between railroads so as to make it prompt and continuous. It not only provides for the temporary expropriation of terminals and main track of one railway to the common use of one or more other railways in an

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[5] See 49 U.S.C. 3 (4) and historical note appended.

emergency, but it also contemplates the compulsory sharing of one company's terminals with one or more companies as a permanent arrangement". *Railroad Commission* v. *Southern Pacific Co.*, 264 U.S. 331, 343. This "drastic limitation of a carrier's control and use of its own property" was intended, the opinion continues, "to secure convenience and dispatch for the whole shipping and travelling public in interstate commerce". *Id.*, pp. 343-344. As the Commission has stated (*Consolidation of Railroads*, 159 I.C.C. 522-523):

> Generally speaking, the terminal railroad properties, wherever located, automatically fall into the aggregation of terminal properties of which they are a part * * *. All terminal properties should be thrown open to all users on fair and equal terms so that every industry on whatever rails shall have access to all lines radiating from that terminal, and every line carrier reaching that terminal shall similarly have access to all terminal tracks within the terminal area * * *.
>
> The unification of terminal properties everywhere should put an end to disputes * * * to the advantage alike of all railroads and all users of railroads. In the interest of efficient and economical operation and the free movement of traffic, restrictions in service and discrimination in charges which have arisen from differences in local terminal situ-

ations should cease to be a feature of railroad operation.[6]

Plainly, the order in the instant case, providing in effect that the Milwaukee shall have "access to all terminal tracks within the terminal area" of the Milwaukee harbor, is in full keeping with the basic statutory purpose.

3. Appellant challenges the sufficiency of the Commission's findings and of the supporting evidence. We have already alluded to the basic findings and to the character of the evidence before the Commission. We shall not attempt to elaborate further in this motion, since the findings and evidence are set forth at length in the Commission's reports and in the findings and conclusions of the district court. We would point out that the record has been carefully examined by a three-judge court, which held the findings to be adequate in all respects and fully supported by substantial evidence (Conclusions of Law 5-8).

For the foregoing reasons, we believe that this appeal presents no substantial questions. It is

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[6] See, also, *El Dorado & Western R. Co.* v. *Chicago, Rock Island and Pacific R. Co.*, 5 F. 2d 777 (C.A. 8); *Pittsburgh & West Virginia R. Co.* v. *United States*, 41 F. 2d 806 (N.D. Ohio); *Hastings Commercial Club* v. *Chicago, M., St. P. & P. Ry. Co.*, 69 I.C.C. 489, 494; *Chicago & N.W. Ry. Co.* v. *Ann Arbor R. Co.*, 263 I.C.C. 287; *Use by Erie of Niagara Junction Ry. Co. Terminals*, 269 I.C.C. 493, 497-498; *Erie R. Co. Acquisition*, 275 I.C.C. 679, 687.

respectfully submitted that the decree of the district court should be affirmed.

/s/ ROBERT L. STERN
ROBERT L. STERN,
Acting Solicitor General.

/s/ ALLEN CRENSHAW,
ALLEN CRENSHAW,
Acting Chief Counsel,
Interstate Commerce Commission.

SEPTEMBER 1951.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 353

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL.

MOTION OF INTERVENER APPELLEE PUBLIC SERVICE COMMISSION OF WISCONSIN TO AFFIRM.

Now comes the Public Service Commission of Wisconsin, an intervener in the above-entitled proceedings and an appellee, and hereby moves the United States Supreme Court, pursuant to the Rules of the United States Supreme Court (Rule 12, Paragraph 3), that the final decree and the judgment of the three-judge statutory court entered in the above-entitled cause on July 16, 1952, be affirmed, and for reasons therefor states as follows:

1. This motion to affirm is made upon the ground that the questions raised by the appellant Chicago and North Western Railway Company in its assignment of errors and

prayer for reversal filed in this cause are so insubstantial as to require no further argument, and that all such questions have been exhaustively, carefully, and correctly considered and decided by the three-judge statutory court.

2. There is substantial evidence to support the finding of the Interstate Commerce Commission that under Section 1, Paragraph 21, of the Interstate Commerce Act, the proposed extension was necessary.

3. There was substantial evidence to support the finding of the Interstate Commerce Commission that under Section 3, Paragraph 5, of the Interstate Commerce Act, the proposed extension was practicable and would in no way impair the ability of the Chicago and North Western Railway Company to perform its service to the public.

4. The report of the Interstate Commerce Commission is entirely adequate and sufficient to support its order.

5. That the findings of fact, conclusions of law, final decree, and judgment of the three-judge statutory court are in all respects proper and correct, and that the order of the Interstate Commerce Commission directing the Chicago, Milwaukee, St. Paul and Pacific Railroad Company to construct the extension and directing the Chicago and North Western Railway Company to permit the construction across its right-of-way, is a legal and valid one, which the three-judge statutory court properly concluded.

6. That additional reasons for the support of the motion to affirm are stated in the motion to affirm filed in this cause by the United States of America, and this intervener appellee hereby subscribes to and adopts the reasons stated in said motion to affirm filed by the United States of America.

WHEREFORE, this intervener appellee Public Service Commission of Wisconsin respectfully prays, pursuant to the

Rules of the United States Supreme Court (Rule 12, Paragraph 3), that the final decree and judgment of the District Court in all respects be affirmed.

Dated at Madison, Wisconsin, this 8th day of September, 1952.

PUBLIC SERVICE COMMISSION OF WISCONSIN,
WILLIAM E. TORKELSON,
By HELMAR A. LEWIS,
Attorney.

(4114)

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SEP 24 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 353

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

MOTION OF INTERVENER APPELLEE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY TO AFFIRM.

Now comes the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, an intervener in the above entitled proceedings and an appellee, and hereby moves the United States Supreme Court, pursuant to the Rules of the United States Supreme Court (Rule 12, Paragraph 3), that the final decree and the judgment of the three-judge statutory court entered in the above entitled cause on July 16, 1952, be affirmed, and for reasons therefor states as follows:

1. This motion to affirm is made upon the ground that the questions raised by the appellant Chicago and North West-

ern Railway Company in its assignment of errors and prayer for reversal filed in this cause are so insubstantial as to require no further argument, and that all such questions have been exhaustively, carefully, and correctly considered and decided by the three-judge statutory court.

2. There is substantial evidence to support the finding of the Interstate Commerce Commission that under Section 1, Paragraph 21, of the Interstate Commerce Act, the proposed extension was necessary.

3. There was substantial evidence to support the finding of the Interstate Commerce Commission that under Section 3, Paragraph 5, of the Interstate Commerce Act, the proposed extension was practicable and would in no way impair the ability of the Chicago and North Western Railway Company to perform its service to the public.

4. The report of the Interstate Commerce Commission is entirely adequate and sufficient to support its order.

5. The findings of fact, conclusions of law, final decree, and judgment of the three-judge statutory court are in all respects proper and correct, and the order of the Interstate Commerce Commission directing this intervener appellee to construct the extension and directing the Chicago and North Western Railway Company to permit the construction across its right of way is a legal and valid one, which the three-judge statutory court properly concluded.

6. Additional reasons for the support of this motion to affirm are stated in the motion to affirm filed in this cause by the United States of America, and this intervener appellee hereby subscribes to and adopts the reasons stated in said motion to affirm filed by the United States of America.

WHEREFORE, this intervener appellee Chicago, Milwaukee, St. Paul and Pacific Railroad Company respectfully prays, pursuant to the Rules of the United States Supreme Court

(Rule 12, Paragraph 3), that the final decree and judgment of the District Court in all respects be affirmed.

Dated at Chicago, Illinois, this 5th day of September, 1952.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

By M. L. BLUHM,
THOMAS H. MAGUIRE,
J. E. GOGGIN,
Its Attorneys.

(3981)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Appellant, vs. UNITED STATES OF AMERICA, and the INTERSTATE COMMERCE COMMISSION, Appellees.	No. 353

APPELLANT'S BRIEF OPPOSING THE MOTIONS TO AFFIRM.

NYE F. MOREHOUSE,

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TWENTIETH CENTURY PRESS, INC., CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, Appellant, vs. UNITED STATES OF AMERICA, and the INTERSTATE COMMERCE COMMISSION, Appellees.	No. .....

APPELLANT'S BRIEF OPPOSING THE MOTIONS TO AFFIRM.

FOREWORD

This Court's jurisdiction in this appeal is not questioned. Appellees' motion to affirm is made on the sole contention that the questions raised are not substantial (Supreme Court Rule 7, Paragraph 4). Separate formal motions to affirm have been filed by each of three interveners.* Thereby they, in effect, joined in appellees' motion, adopting it by reference (in advance) and setting forth no new matter whatever. Accordingly, refutation of all four motions will be accomplished by directing this brief to the contentions set up by appellees.

* The City of Milwaukee, the Public Service Commission of Wisconsin, and Chicago, Milwaukee, St. Paul and Pacific Railroad Company (referred to as "the Milwaukee") intervened and participated in the trial below.

APPELLEES' CONTENTIONS RESPECTING THE COMMISSION'S POWER UNDER SECTION 1(21) ARE BASED UPON THE FALLACIOUS ASSUMPTION THAT THERE IS BUT ONE INDUSTRIAL DISTRICT WITHIN THE CITY OF MILWAUKEE.

Conceding as they must the authoritative rule of the *Oregon-Washington* case (288 U. S. 14, 35-40), appellees seek to avoid its application here by an assumption that the Jones Island Harbor Terminal is located within a territory which the Milwaukee already holds itself out to serve. They attempt to support this assertion by the simple statement that the Milwaukee's main line reaches and serves the City of Milwaukee and has done so for many years. Since the Harbor Terminal is within the City, *ergo*, the Milwaukee *must* be so holding itself out.

So goes the argument, in direct conflict with appellees' own factual recitals and those in the Commission's reports and in the District Court's findings 1, 2 and 3,* showing that the Milwaukee is shut off completely from the territory within the City which extends along the lake shore and is bounded on the west by the North Western's main line. The City's Jones Island Harbor Terminal, here involved, is located in this lake front territory at the north end of a narrow peninsula which extends up to the harbor entrance. It is served, exclusively, by the North Western.

---

* The important fact that the North Western is the only carrier which has served, or is in a physical position to serve, the Harbor Terminal is shown in these findings. The implication, in court finding 3, that the old Illinois Steel Company property is a part of Jones Island, is incorrect. Finding 3 fails to state the undisputed facts that the Milwaukee's spur never did completely cross the North Western right-of-way and that its right to serve the Steel Company through use of the track which extends part way across that right-of-way terminated when the Steel Company was dismantled in 1938. These findings contain other inaccuracies and extraneous statements as to supposed contract rights, etc., which need not be discussed in this brief, but are contrary to the undisputed evidence.

This situation exists as the natural result of the topography of the area within the City and the relative locations of the two railroad lines. The Milwaukee, paralleling the North Western a half-mile and more to the west, is so located that it cannot reach the lake shore area without extending an existing branch from its main line so that it will cross the main line of the North Western. The objective of the City in proceeding before the Commission was to force the Milwaukee line across the North Western so the Milwaukee could connect with a proposed new track of the City to lead northward to reach and connect with the City's Harbor Terminal trackage on Jones Island. The Milwaukee has never claimed or had such right to cross the North Western or to reach and directly serve the Harbor Terminal.

In such circumstances how can it be said that the Milwaukee has held itself out or undertaken to serve the Harbor Terminal? The implication thrown out by the Commission and picked up by appellees is that since the Milwaukee reaches and serves *some part or parts* of the area within the City, it must follow that it has undertaken to serve *all parts* of the entire City area which covers some 30 square miles. Actually, the City is divided into several distinct territories bounded by important topographical features extending back from the west shore of Lake Michigan. Among these is the Milwaukee River, a large navigable stream which extends westward from the Harbor entrance and turns northward, dividing the City into separate industrial territories. The territory east of that river is served alone by the North Western. That west of the river is served by the Milwaukee. Neither railroad serves both of those territories. Near the Harbor entrance the Kinnickinnic River, also navigable by lake shipping, branches off to the south and west forming the west boundary of "Jones Island," the peninsula at the north end of which the City's

Harbor Terminal is located. Thus Jones Island and the Harbor Terminal are effectively segregated from the mainland on the west. They are accessible by land only from the south through the neck of the peninsula from the lake shore territory exclusively served by the North Western. This is the only rail terminal controlled or operated by the City or by its affiliated Board of Harbor Commissioners; but there are numerous privately owned terminals located in the City in the several other industrial territories.

UPHOLDING THE COMMISSION'S ORDER WOULD DEFEAT THE PURPOSE OF CONGRESS AND WOULD BE CONTRARY TO LEADING DECISIONS OF THIS COURT.

Should appellees' contention be upheld, it would follow that in all industrial cities reached by more than one railroad each railroad would have the right *without any authority from the Commission* to extend its line so as to reach and serve any and all parts of the general territory within the City without any regard for natural barriers, the locations of the lines of competing rail carriers, or the existence of separate industrial districts exclusively built up and served by its competitors. Having established the principle that the entire city was already within the territory of each carrier, all extensions to all parts of the city would have to be regarded as mere "spur, industrial, team, switching or side tracks" within the exception set forth in section 1(22) (49 U. S. C., Sec. 1(22); appellant's Statement as to Jurisdiction, Appendix C, p. 2). This would open up in these industrial cities a period of what might well turn out to be one of intense competitive and retaliatory construction of trackage by the various railroads reaching each city—each railroad striving to reach and serve all of the more important industrial districts. It would strongly promote the uneconomical duplication of railroad facilities

and services and the competitive waste which it is the purpose of Congress to avoid.

In *Texas & Pacific R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, the court's opinion, by Mr. Justice Brandeis characterizes the tracks covered by paragraph (22) of section 1, as follows (p. 278):

> "Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small."

Comparing such tracks with line extensions, the opinion proceeds:

> "But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of Par. 18, *although the line be short, and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.* Being an extension, it cannot be built unless the Federal commission *issues its certificate* that public necessity and convenience require its construction." (Emphasis, ours.)

In that case, one railroad serving the City of Dallas, Texas, was enjoined from extending its line, without prior Commission authority under section 1(18), into an industrial district of that city already exclusively served by another. The effect would have been the same as in the instant case, to enable the first railroad to tap the industrial district, secure a part of the competitive business, and eliminate the division of rates with the second railroad on traffic to and from the industrial district in question. (270 U. S., at pages 276-7.)

It is implied by Appellees that the Oregon-Washington decision is not applicable here because of the much greater length of the extension there involved. As noted above in the quoted passage from the Texas & Pacific opinion, the length of the proposed extension is not at all determinative. If its purpose is to project the carrier's direct service into new territory it is an extension, regardless of its length. The purpose for which the track is to be constructed (here to tap another carrier's territory) is the determining factor. In *People* v. *Public Service Commission,* 233 N. Y. 113, 135 N. E. 195, a piece of track 100 feet long was held not within the exception of paragraph (22). Conversely, it has been held that a branch line 9 miles long, built and maintained to serve a single industry and not involving territory served by another carrier, was a "spur" within the exception of paragraph (22). *United States* v. *Idaho,* 298 U. S. 105, 107-9.

Acceptance of the Commission's ruling here would create a precedent whereunder Commission's control over these highly important railroad extensions would be greatly impaired. Section 1(18) and the *Texas & Pacific* decision would both be set aside and held for naught as to all construction of new railroad lines or extensions within most, if not all, ~~of all~~ industrial cities and communities throughout the land. This would almost completely cir-

cumvent the regulatory scheme provided in paragraphs (18)-(22) of section 1, for it is in these industrial centers that competition for railroad traffic is most keen.

Appellees seek a disregard of the *Texas & Pacific* rule by asserting that in the instant case the Commission *has* passed upon the question of public convenience and necessity. This of course begs the point, which is that, under section 1(21), the Commission would only have power to act if the Milwaukee were already serving Jones Island, the area in which the Harbor Terminal is located. No certificate having been asked for or granted under section 1(18), the rule of the *Texas & Pacific* case has been violated.

Under section 1(18) the Milwaukee alone could have made the application. It has not done so. Different issues, proof, and procedure would have been required had it done so. *Oregon-Washington* case, 288 U. S. 14, 36-8. The issues involved in a determination of the question of public convenience and necessity under section 1(18) have never been before the Commission in this case.

It is important to note at this point that the City attempted, first, to procure an order from the Public Service Commission of Wisconsin (an intervener here) to force this extension. That Commission's conclusions appear in the record here as the City's Exhibit 36 introduced in the Interstate Commerce Commission proceeding. Those conclusions are as follows:

> "1. A Milwaukee Road extension of the Bay View Spur from its present terminus on the right-of-way of the North Western Road across that portion of the right-of-way between the present terminus and the municipal harbor tract, for the purpose of serving the municipal-harbor terminal would require *a certificate of convenience and necessity* from the Interstate Commerce Commission of the United States under the provisions of the Interstate Commerce Act.

2. This Commission has no jurisdiction on the application of the petitioner to order the Milwaukee Road to extend its lines for such a purpose.

3. This Commission has no jurisdiction on the application of the petitioner to order the North Western Road to permit the use of its right-of-way for such a purpose." (Emphasis supplied.)

The City, accepting that decision, sought no appeal in the courts of Wisconsin. These conclusions amount to a holding that the proposed extension would not be a "spur" or other track within that Commission's jurisdiction under paragraph (22) but would come within the Interstate Commerce Commission's jurisdiction under paragraph (18), for it is only under the latter paragraph that a certificate may be issued.

The Wisconsin Commission, in fairness and good conscience, should not now be permitted to dishonor its own decision either by contending that this extension is a spur or that it can be constructed pursuant to paragraph (21) without the prior issuance of a certificate. No more should the City (also an intervener) or the defendants be permitted to do so, in view of the record made by the City, itself, before the defendant Commission.

Under the rule of the *Texas & Pacific* and *Oregon-Washington* cases, the Commission's power with respect to extensions of railroad lines into new territory is permissive only and can be exercised only upon an application under section 1(18) and compliance with the procedures set up in section 1(19).

THE COMMISSION'S LACK OF POWER CANNOT BE CURED BY AGREEMENT OR ACQUIESCENCE OF THE PARTIES.

Appellees also seek to meet the fatal deficiency here by suggesting that any examination of the Commission's lack

of authority to act under section 1(21) should be avoided because the Milwaukee is not objecting to the proposed extension of its line and is willing to comply with the Commission's order. It would be a curious doctrine indeed which would thus, by mere acquiescence of a private party, hold the Commission to be vested with a power which the highest legal authority of the land has already determined was withheld by Congress, viz.: the power to enter a compulsory order for an extension of a line into new territory. Such a specious argument for evading the will of Congress should certainly not be countenanced by either the courts or the Commission itself in view of the long established recognition of the Commission as a body whose powers are strictly limited to those expressly given by statute and not to be enlarged by implication or acquiescence. *Interstate Commerce Commission* v. *Cincinnati, etc. R. Co.*, 167 U. S. 479, 494. *Chicago, M. & St. P. & P. R. Co.* v. *United States*, 33 F. (2d) 583, 587. *La Salle & B. R. Co.* v. *C. & N. W. Ry. Co.*, 13 I. C. C. 610, 613. *Wisconsin R. R. Commission* v. *C. & N. W. Ry. Co.*, 87 I. C. C. 195, 198.

APPELLEES' ATTEMPT TO FIND A BASIS FOR COMMISSION ACTION UNDER SECTION 3(5) IS PALPABLY STRAINED AND FALLACIOUS.

With reference to appellant's proposition that the proposed construction and operation of the Milwaukee's line extension "across the main line tracks and right of way"* of the North Western will not constitute a use of any North Western terminal facility, appellees imply that this is unimportant because such proposed operation would enable the Milwaukee to reach and serve the Harbor Terminal of the City and hence would be "a terminal operation." It is then asserted by appellees that "the proposed

* So stated in the Commission's order. See Paragraph 3 in Exhibit B attached to appellant's Statement as to Jurisdiction.

extension will take place in the very center of the maze of switching operations which make up the terminal of the City of Milwaukee." (Appellees' Motion to Affirm, page 7.)

These assertions indicate a high state of confusion and misunderstanding as to the physical facts, even as they are incompletely and inaccurately stated in the Commission's reports. The proposed extension would end at the east line of the North Western's right of way at a point quite outside of and a considerable distance from the Jones Island Harbor Terminal which is the only existing terminal of the City dealt with in the record or in the Commission's reports. It is that terminal and its facilities the use of which is sought.

The crossing of the North Western's main line tracks and right of way by the Milwaukee's proposed line extension is sought solely as a means to project the Milwaukee's line over to the lake front area from whence it can proceed northward a half mile and more to reach and there operate on the City's terminal trackage. Construction and operation of this proposed extension would constitute no use of terminal trackage or other terminal facilities of any description of the North Western. It would effectuate nothing more nor less than a crossing of the North Western's "main line tracks and right of way." The mere reference to this in the Commission's order as a use of North Western terminal facilities (paragraphs 3 and 5) does not make it so. Appellees now refer to this administrative fiat as an expert determination and imply that this Court may not inquire into its nature or take any action to correct it. They forget that primary objectives of judicial review of administrative orders are to make sure that administrative agencies do not exceed the powers granted to them by Congress and that in the exercise of granted powers they do so in a manner consistent with the constitutional guaranties.

Quotations from the first *Los Angeles Depot* case (264 U. S. 331) and the Commission's general decision regarding consolidation of railroads (159 I. C. C. 522-3) do not reach the point here involved. No amount of liberal construction can inject into section 3(5) a power to appropriate a part of one railway company's main line right-of-way for the purpose of providing a crossing of that main line by an extension of another competing railroad. As aptly stated in the second *Los Angeles Depot* case (280 U. S. 52, 68-9), a "more specific and express power than is found in the act" would be required for such purpose. And, as the Commission itself has said (p. 198):

> "In the absence of specific language only the most unmistakable evidence of an intention to confer upon us power to act under given circumstances would warrant the assumption of such power through our own construction of the act." Wisconsin R. R. Commission, 87 I. C. C. at p. 198.

THE LACK OF ESSENTIAL BASIC FINDINGS IS EMPHASIZED BY APPELLEES' MOTION.

On page 4 of appellees' motion to affirm the three quotations from the Commission's reports apparently cover the only portions of those reports which are deemed by appellees to be in the nature of factual findings. In paragraph 3 on page 8, appellees refer to these as "basic findings."

The first quotation is a simple conclusion that delays termed "serious" involved in the present joint-line switching service to the Harbor Terminal would be avoided if the proposed extension and switching connection were made; and that direct access of the Milwaukee is "necessary in the development of the harbor area." The reference to delays is carefully worded to avoid the need for reference to the other readily available means to eliminate

delays, viz.: through changing the present method of switching to require the Milwaukee to receive the interchange of cars from the North Western at Washington Street within an hour's time. Delays in switching service are commonly cured by means other than building railroad extensions. Section 1(11)* gives the Commission broad powers to enforce adequate car service practices (such as this switching in interchange service) which reasonably should be explored and exhausted before resort is had to the more drastic remedy of compulsory line extension under section 1(21).

This lonely finding regarding delays, we submit, does not supply the "basic and essential" facts to support an ultimate conclusion of public necessity. Furthermore the necessity referred to here is future in nature because it refers to the development of the harbor area and the preceding recitations in the Commission's first report show that the development in the past 20 years to the present time, under exclusive North Western service, has been truly remarkable (279 I. C. C. at p. 530). Future convenience and necessity cannot be considered by the Commission under Section 1(21) (*Oregon-Washington* case, 288 U. S. 14, 36-8). These findings fall short of what is

---

* Paragraphs 1(10) and 1(11) read as follows (49 U.S.C. § 1(10) and (11):

"(10) The term 'car service' in this part shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

"(11) It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

required to support the ultimate general finding under that section.

An even greater lack of essential basic findings under Section 3(5) is not given any consideration in appellees' motion. The second and third quoted passages on page 4 of appellees' motion are mere general or ultimate conclusions, which, standing alone, as they do, have no support by way of basic findings of fact so often found by this court to be essential. (See *Florida v. United States*, 282 U. S. 194, 214-5, and the other cases cited on page 8 of appellant's Statement as to Jurisdiction.) The second quotation makes reference to a "switch connection between the extension of the Milwaukee and the municipal harbor tracks" and contains the ultimate findings in the language of section 1(9). In its second report the Commission disclaimed and repudiated this attempt to exercise power under that section (383 I. C. C. at pp. 313-4).

Switching then to paragraph (5) of section 3 (49 U. S. C. §3(5)) the Commission, in the second report, came up with the astounding conclusion that the extension of the Milwaukee's line across the North Western's main line tracks and right-of-way was a use of a North Western "terminal facility"—a conclusion directly at odds with the inescapable physical facts and undeniable purpose and effect of the Commission's order (Ex. B, par. 3, Appellant's Statement as to Jurisdiction).

It is respectfully submitted that such verbal legerdemain is no substitute for basic findings of fact, quasi-jurisdictional in nature, which would lay a basis for Commission action under section 3(5). Such findings obviously were not made because no essential fact exists which would show that a use of any terminal facility of the North Western is involved.

THE QUESTIONS RAISED IN THIS APPEAL ARE NOVEL AND OF SUCH WIDE PUBLIC INTEREST AS TO FULLY MEET THE TEST OF SUBSTANTIALITY.

The Commission's theory that it has power to compel an extension of a railroad line to any industrial district within a city by any railroad which reaches the city is novel. So far as we are advised it has never been put forth before. Certainly it has never been passed upon by any court.

Likewise, the Commission's theory that it has power to force a line extension by one railroad across a competing railroad's main line, appropriating a part of the latter's right of way; and that this will constitute a use of one of the latter's terminal facilities, is novel. This obviously strained construction of section 3(5) has not been put forth before.

The wide public interest in these questions and in the further questions raised by our assignment of errors is set out on pages 12-16 of our Statement as to Jurisdiction and will not be repeated here. It has not been questioned, in any of the motions to affirm, that these questions are of wide public interest and concern as we have stated.

We respectfully sumbit that these questions are so substantial as to merit full consideration and review by this Court.

Respectfully submitted,

NYE F. MOREHOUSE,

P. F. GAULT,

EDGAR VANNEMAN,
Attorneys for Appellant.

400 W. Madison Street,
Room 1422,
Chicago 6, Illinois.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 1952, I caused copies of the foregoing brief to be served by mail on counsel for all parties of record.

NYE F. MOREHOUSE,
Attorney for Appellant.

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No. 353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois.

APPELLANT'S PETITION FOR REHEARING.

NYE F. MOREHOUSE,
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EDGAR VANNEMAN, JR.,
Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No. 353

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,

Appellees.

APPELLANT'S PETITION FOR REHEARING.

Appellant prays that this Court grant a rehearing of its order entered November 10, 1952 granting the motions to affirm and affirming the judgment of the United States District Court for the Northern District of Illinois.

REASONS FOR GRANTING REHEARING.

A new development since the submission to this Court upon which the November 10th order was based necessitates this petition. The decision of the United States Court of Appeals for the Tenth Circuit in *Union Pac. R. Co.* v. *Denver & Rio Grande Western R. Co.*, reported in 198 F. 2d 854 (Advance pamphlet No. 7, November 3, 1952), raises a direct conflict with the decision of the lower court herein. This conflict and its far-reaching adverse effect we point out below.

In the instant case the findings of the District Court and the reports of the Commission reflect the undisputed facts that the main line of appellant's railroad lies *between* the main line and other tracks of appellant's competitor, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (called "the Milwaukee"), and the lake front industrial area within the City of Milwaukee known as Jones Island, into which the Milwaukee seeks to extend its line of railroad; and that the appellant since 1928 has been the only railroad having physical connections with or serving the City's Jones Island Harbor Terminal—the industrial district in question. (Appellant's Statement as to Jurisdiction, Appendix A, pp. 18-19.) Notwithstanding these uncontroverted facts, the Commission and the court have held that the proposed construction of trackage by the Milwaukee *would not be* an extension of its railroad *into new territory already served by another carrier.*

The decisions of the Commission and the District Court are based upon these premises:

(a) The proposed construction of a track by the Milwaukee "across the main line tracks and right-of-way" of appellant *would be an extension* of the Milwaukee's line

of railroad, but it *would not be an extension into new territory.* Consequently the prerequisite of a certificate of public convenience and necessity under section 1(18) (49 U.S.C. § 1(18)) could be avoided.

(b) Recognizing that it lacked power on the complaint before it to order the proposed extension if it *would project* the Milwaukee into new territory, the Commission said:

> "While our authority under paragraph (21) of section 1 to require a carrier by railroad to extend its lines does not include extensions into new territory beyond the carrier's undertaking, the extension here into the harbor terminal, within the Milwaukee corporate and switching limits, clearly would be well within the Milwaukee's undertaking and 'holding out.' *Cf. Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 38-40." (283 I.C.C. 313-4).

The Commission thus conceded the applicability and controlling effect of the *Oregon-Washington* case and acknowledged that it had no power to order the proposed extension of the Milwaukee into the City's harbor terminal if such extension would project the Milwaukee's trackage and service into a new industrial district. But it sought to meet that issue by the above quoted passage, implying that there could be no such thing as a separately and exclusively served industrial area within the greater area comprising the entire city of Milwaukee. (The evidence disclosed a number of separately served industrial areas within the City, as is the case in practically every industrial city of any importance.)

The Commission was forced into this incongruous and unrealistic position because of the ill-considered conclusion in its first Report that it had power to issue its order

under section 1(21) (279 I.C.C. at page 531). The Commission evidently did not then have in mind the fact that it had no authority under that section to order an extension into new territory. Hence in its second Report it sought to patch up this defect in the manner exposed above. In doing so it had to cling to its original idea that this would be an extension of the Milwaukee's line of railroad, else it would have been left without any jurisdiction or authority whatever respecting the proposed track construction which then would have been within the exemption of section 1(22). (49 U.S.C. § 1(22); appellant's Statement as to Jurisdiction, p. 28.) *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 278. To avoid that pitfall it had resort to the fiction that the Milwaukee had already undertaken to serve Jones Island because it was serving elsewhere in Milwaukee.

In the *Union Pacific* case cited above, the disputed industrial district lay entirely within Salt Lake City and lay *between the parallel main lines of the two competing railroads* and was immediately adjacent to them. These two main lines were only four city blocks apart at the widest point and the disputed district lay in-between. It so happened that the Rio Grande already had some trackage extending into the disputed area and had been rendering service therein while the Union Pacific had never extended its trackage into, or served, the area. Upon new industrial developments taking place in the area the Union Pacific sought to so extend its trackage and it was enjoined from so doing by the suit of the Rio Grande. The Circuit Court, in affirming the District Court's decision, said:

> "The court concluded that the industrial lead track as proposed to be built constituted an extension within the meaning of paragraph (18) of section 1 of the

Transportation Act; and that it did not constitute a spur, industrial, team, switching, or side track, within the meaning of paragraph (22) of the Act." (198 F. 2d, No. 7, at p. 856)

The following further quotation from this Circuit Court decision discloses the direct conflict between its conclusion and that of the Commission and the District Court herein:

"Here, the heart of the industrial area lies between Second and Fourth West Streets. Rio Grande is serving industries within the area by means of spur tracks extending from its main line and from its interchange track. And that company is in position to serve adequately by like means other industries which may come into the area as further development occurs. But industries between Second and Fourth West Streets are not presently reached and served by Union Pacific. It does not have spurs extending from its main line across Second West Street and thence into the area. And it does not reach industries within the area by other trackage. So far as that company is concerned, the proposed trackage will invade new territory not previously or presently served by it; and it will result in loss of revenue to a competing line which is furnishing adequate service to industries already in the area and is prepared to supply like facilities to other industries which may come into the area in the future. The proposed track is an extension, within the meaning of paragraph (18); and its construction is forbidden unless and until a certificate of convenience and necessity has been obtained. *Texas & Pacific Railway Co.* v. *Gulf, Colorado & Santa Fe Railway Co., supra;* and see *Missouri Pacific Railroad Co.* v. *Chicago, Rock Island & Pacific Railroad Co.*, 8 Cir., 41 F. 2d 188, certiorari denied 282 U. S. 866, 51 S. Ct. 74, 75 L. Ed. 765; *Missouri Pacific Railroad Co.* v. *St. Louis Southwestern Railway Co.*, 8 Cir. 73 F. 2d 21." (198 F. 2d, No. 7 at p. 859)

The facts presented in this appeal are very closely analogous to those in the *Union Pacific* case. Here, like the Rio Grande, the appellant is serving industries within the Jones Island area by means of a spur track extending from its main line. It is in position to serve adequately by like means any other industries which might come into the area as further development occurs. The Commission in its first Report noted appellant's present ability to handle "twice as much traffic as it now handles" in the harbor terminal service (279 I.C.C. at page 529). The adequacy of appellant's service was not questioned. The Milwaukee has no spurs or trackage of any kind extending into the Jones Island area. It does not reach or serve the area at all. The proposed trackage, like that of the Union Pacific in the above quoted decision, "will invade new territory not previously or presently served by it." Appellant's resultant loss of revenue in excess of $100,000 per annum was shown to the Commission and the District Court.

Additional facts before the court in this appeal present an obviously stronger case for the enforcement of section 1(18), for the Commission's order requires the extension of the Milwaukee's

> "line of railroad, known as the Bay View spur, now terminating at a point south of East Bay Street in Milwaukee, Wis., across the main line tracks and right-of-way of defendant Chicago and North Western Railway Company to a connection with the municipal harbor terminal of complainant City of Milwaukee east of and adjacent to said right-of-way." (Excerpt from the order of September 27, 1951, Exhibit B, appellant's complaint in the District Court.)

No such crossing of the Rio Grande was involved in the *Union Pacific* case. Here the Commission and the Court had before them the additional factor of a serious opera-

ting hazard to be created by the Milwaukee's proposed slow switching movements across the appellant's main line over which a great many high-speed, streamlined passenger trains are operated daily.

These factors emphasize the importance of the statutory prerequisite that no such extension of a line of railroad shall be undertaken "• • • unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction • • •." (49 U.S.C. § 1 (18).) No such certificate has been applied for or issued in this case. This defect was pointed out to the Commission's Division 3 and to the full Commission and was brushed aside (279 I.C.C. at pp. 530-1; 283 I.C.C. at pp. 313-4). As the District Court filed no opinion we are unable to say what consideration was given to this point. It made no specific finding as to this lack of a certificate under section 1 (18) and merely adopted the Commission's conclusion that it had authority under section 1 (21) (Appellant's Statement as to Jurisdiction, p. 22, conclusion 3).

Thereby the District Court erred by failing to observe that the Commission had given the impression it was following this Court's decision in the *Oregon-Washington* decision while actually pursuing an opposite course.

The recent *Union Pacific* decision in the Seventh Circuit is in direct conflict with the judgment to which this appeal is directed. That decision holds flatly and, as appellant contends, correctly, that track construction of the character here involved "is forbidden unless and until a certificate of public convenience and necessity has been obtained." By reason of this conflict, unless this Court sees fit to exercise its functions of review, the rail carriers of the nation will be required to follow one rule in the

Tenth Circuit, an entirely different rule in the Seventh Circuit, and be left to a choice between the two in other jurisdictions.

It is difficult to visualize a more chaotic and destructive competitive situation than that which would exist wherein the railroads operating in such large industrial cities as Milwaukee, Chicago and Gary would be free to extend their lines anywhere within these cities, at will, and without any certificate from the Commission. This necessarily would follow the final affirmance of the District Court's judgment herein for that judgment has adopted the Commission's theory that the entire territory within the City of Milwaukee is to be considered within the Milwaukee's present "undertaking" and "holding out" although, admittedly, it has never reached or served the City's Harbor Terminal it now seeks to reach and, admittedly, it is not physically possible for it presently to do so. Its railroad must be extended across appellant's "main line tracks and right-of-way" before it can do so.

Concurrently, the railroads serving such cities as Salt Lake, Denver and Cheyenne would be required by the law of the Tenth Circuit to obtain certificates from the Commission before undertaking similar extensions.

Elsewhere, in the Eighth Circuit for example, where the two carriers here involved are engaged in close competition and both serve numerous large industrial communities, there would be uncertainty as to the true meaning and intent of these statutory provisions. They and other railroads throughout other circuits would have to guess at the construction of the statutes to be followed there.

Such a situation is quite incompatible with orderly administration and enforcement of statutes which were de-

signed to provide the nation with an adequate transportation system and specifically

> *"to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers;"* (National Transportation Policy, 54 Stat. 899; Title 49 U. S. Code, note preceding Section 1; Appellants Statement As To Jurisdiction, p. 29)

CONCLUSION.

For the reasons set forth above and in appellant's Statement as to Jurisdiction and its brief opposing the motions to affirm, it is respectfully urged that a rehearing and reconsideration be granted with respect to this Court's order allowing the motions to affirm and that, thereupon, that order be set aside, the motions to affirm be denied, and the Court proceed to review the decision of the United States District Court for the Northern District of Illinois pursuant to the appeal herein.

Respectfully submitted,

(NYE F. MOREHOUSE)

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and is not for delay, and is in accordance with Rule 33 of this Court, as amended October 13, 1947.

.....

(NYE F. MOREHOUSE)

Certificate of Service.

I hereby certify that on this 21st day of November, 1952, I caused copies of the foregoing petition for rehearing and certificate of counsel to be served by mail on counsel for all parties of record.

.....

(NYE F. MOREHOUSE)
Attorney for Appellant.